Office Supreme Court, U.
FILED
JUL 5 1977
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 849

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner,

v.

FRANKLIN JONES, Administrator of the Estate of D. B. Ferguson, Deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF

FRANK H. MOORE,
J. J. KING,
J. Q. MEHAFFEY,
A. F. SMITH,
Counsel for Petitioner.

(32,801)

INDEX.

	Page
Petition for writ of certiorari	1
Specifications of error	8
Brief	13
I. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that D. R. Ferguson was guilty of negligence directly contributing to his death	14
II. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that D. R. Ferguson was guilty of negligence which was the sole proximate cause of his death	25
III. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that the death of D. R. Ferguson was the result of risks assumed by him	29
IV and V. The Supreme Court of Texas, in a case arising under the Federal Employers' Liability Act, and on the facts in this case, erred in failing to reverse outright the judgment of the district court, and in reversing the judgment of the Court of Appeals	31
VI. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to follow the rules of law established by the Federal courts in construing the Federal Employers' Liability Act	33

Table of Cases.

Aerkfetz v. Humphreys, 145 U. S., 418	8, 15
Allen v. New York, etc., Co., 98 C. C. A., 253; 174 Fed., 774	9, 17
Atchison, etc., Co. v. McNulty, 285 Fed., 97 (262 U. S., 746)	9, 24
Atchison, etc., Co. v. Weyer, 8 Fed. (2d), 30	9, 30
Atlantic, etc., Co. v. McLeod, 11 Fed. (2d), 22	9, 24
Blunt v. Pennsylvania, etc., Co., 9 Fed. (2d), 395	8, 28
Bradley v. Missouri, etc., Co., 288 Fed., 484	9, 23
Bush v. Baltimore, etc., Co., 288 Fed., 845	9, 24
Chesapeake, etc., Co. v. Nixon, 271 U. S., 218	8, 9, 17, 30
Chicago, etc., Co. v. Andrews, 64 C. C. A., 399; 130 Fed., 65	9, 23
Chicago, etc., Co. v. Coogan, 271 U. S., 427	10, 26
Chicago, etc., Co. v. Houston, 95 U. S., 697	8

Page

Craine v. Metropolitan, etc., Co., 246 Mo., 393 ..... 9, 28
Dernberger v. Baltimore, etc., Co., 155 C. C. A., 551; 243 Fed., 21 ..... 8, 24
Dishon v. Cincinnati, etc., Co., 66 C. C. A., 345; 133 Fed., 471... 17
District of Columbia v. Moulton, 182 U. S., 576..... 9
Elliott v. Chicago, etc., Co., 150 U. S., 245..... 8, 20
Emberlin v. Wichita Falls, etc., Co., 267 S. W., 453; S. C., 255 S. W., 796..... 34
Erie, etc., Co. v. Kane, 55 C. C. A., 129; 118 Fed., 223..... 8, 20
Frazier v. Interstate, etc., Co., 273 Fed., 181 (256 U. S., 703).. 8, 17
Freeman v. Galveston, etc., Co., 285 S. W., 607; S. C., 273 S. W., 979..... 35
Freese v. Chicago, etc., Co., 263 U. S., 1..... 8, 16
Garlich v. Northern, etc., Co., 67 C. C. A., 237; 137 Fed., 837 ..... 9, 23
Goldberg v. Chesapeake, etc., Co., 211 Ky., 115..... 9, 28
Jacobs v. Atchison, etc., Co., 97 Kans., 247..... 19
Jones v. Kansas City Southern Ry. Co., 291 S. W., 528; S. C., 282 S. W., 312; 287 S. W., 304..... 2, 7, 13
Jones v. Louisiana, etc., Co., 243 S. W., 976; S. C., 293 S. W., 363 ..... 34, 35
Kahn v. Cole, 227 S. W., 556..... 32
Louisville, etc., Co. v. Woodward, 99 C. C. A., 479; 176 Fed., 5. 9, 18
Midland Valley, etc., Co. v. Fulgham, 104 C. C. A., 151; 181 Fed., 91..... 27
Miller v. Canadian, etc., Co., 281 Fed., 664..... 8, 18
Missouri, etc., Co. v. Riddle, 277 S. W., 167..... 35
New York, etc., Co. v. McDougall, 15 Fed. (2d), 283..... 9, 30
Northern, etc., Co. v. Freeman, 174 U. S., 379..... 8, 22
Parramore v. Denver, etc., Co., 5 Fed. (2d), 912..... 9, 24
Payne v. Blevins, 280 Fed., 310..... 9, 24
Pheasant v. Director General, 285 Fed., 342..... 8, 17, 28
Pryor v. Williams, 254 U. S., 43; S. C., 272 Mo., 613..... 10, 37
Rollins v. Chicago, etc., Co., 77 C. C. A., 615; 139 Fed., 639.... 9, 23
St. Louis, etc., Co. v. Mills, 271 U. S., 344..... 26
Soccorso v. Philadelphia, etc., Co., 116 Fed., 378; S. C., 170 Fed., 722..... 18
Southern, etc., Co. v. Berkshire, 254 U. S., 415..... 9, 29
Stewart v. Schaff, 269 S. W., 135..... 32
Texas Statutes, Compilation of 1920, Article 1591..... 4, 5
Texas Statutes, Compilation of 1920, Article 1521..... 7
Tomlinson v. Chicago, etc., Co., 67 C. C. A., 217; 134 Fed., 233.. 9, 23
Trochta v. Missouri, etc., Co., 218 S. W., 1038; S. C., 181 S. W., 761 ..... 33, 34
Wichita, etc., Co. v. Lechner, 276 S. W., 216..... 32

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 349

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

v.

FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. R. FERGUSON, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

Your petitioner, The Kansas City Southern Railway Company, respectfully petitions this Court to grant a writ of certiorari to the Supreme Court of Texas, and to remove therefrom to this Court for review the record of the case therein lately pending, of Franklin Jones, Administrator of the Estate of D. R. Ferguson, deceased, plaintiff in error, *v.* The Kansas City Southern Railway Company, defendant in error, being case

No. 762-4730 on the docket of that court (Franklin Jones, Admr., *v.* Kansas City Southern Railway Company, 291 S. W., 528). A certified copy of the record therein is presented herewith.

Review by writ of certiorari is prayed for on the ground that your petitioner specially set up and claimed throughout in this cause rights and immunities under the Federal Employers' Liability Act, to-wit: (1) of the lack of any negligence on the part of petitioner proximately causing the death of decedent; (2) of the negligence of the deceased at the time of the injury, which wholly or partly resulted in his death; and (3) of assumed risk (see Kansas City Southern Railway Company *v.* Jnes, 282 S. W., 312, Rec., 186, 188); which rights and immunities were denied your petitioner by the Supreme Court of Texas in that said court on to-wit: February 23, 1927 (Rec., 326, 328), reversed the judgment of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas, which had reversed a judgment for $13,000 against your petitioner rendered by the District Court of Bowie County, Tex., and affirmed said judgment of the district court, and on, to-wit, April 20, 1927, overruled your petitioner's motion for a rehearing (Rec., 352). In the judgment of said Supreme Court of Texas (which is the court of last resort in Texas), in this cause, said Supreme Court of Texas failed to decide the same in accordance with the applicable principles of law as the same had been determined by the Federal courts, but, on the contrary, applied interpretations of

such principles of law which were in conflict with the decisions of the Federal courts.

Respondent's action is based on the Federal Employers' Liability Act (Rec., 1, 2), and your petitioner asserted in said cause in the district court (Rec., 8 *et seq.*), and throughout the cause the defenses of contributory negligence and assumption of risk, as found by said court of appeals (Rec., 181).

For the sake of brevity the respondent will hereinafter be designated as the "plaintiff," your petitioner as the "defendant," and D. R. Ferguson as the "decedent."

Decedent being then employed as a car inspector in defendant's service, in assisting in making up, on defendant's passing track, a northbound train carrying freight in interstate commerce (Rec., 87), was killed, presumably by a northbound passenger train on defendant's main line track.

Plaintiff (or his predecessor as administrator), sued defendant, an interstate carrier, in the District Court of Bowie County, Tex., to recover damages, under the Federal Employers' Liability Act, for the death of decedent, D. R. Ferguson, an employee of defendant, plaintiff contending that his death was due to his being struck by defendant's passenger train negligently operated. On, to-wit, November 20, 1924 (Rec., 36), a jury returned a special verdict finding defendant guilty of negligence in failing to give warning of the approaching train by bell or whistle, in running the train at an unusually rapid rate of speed, and in failing to dim the headlight on the engine, and that the

light "caused the said D. R. Ferguson to be blinded" (Rec., 38). The jury also found that Ferguson was not negligent, and that his children were damaged by his death in the sum of $13,000, on which verdict judgment was thereupon entered against defendant for that sum (Rec., 37). Defendant duly filed its motion for a new trial (Rec., 41), which was overruled (Rec., 56). It duly appealed from said judgment (Rec., 58) to the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas (hereinafter called the court of appeals), the court having appellate jurisdiction in said cause (Article 1591, Compiled Statutes of Texas, 1920). Said court of appeals found that none of the alleged negligent acts or omissions of the defendant were the efficient cause of the death of decedent, except the alleged failure to ring the engine bell on the approaching passenger train, the court finding that there was evidence that the engine bells were customarily rung on defendant's trains going through Leesville, and that the bell on this engine was not rung. The court further found, however, that decedent was guilty of negligence proximately contributing to his death in that he knew when he assumed his position near the main line track that the passenger train was likely to pass (Rec., 187-188); that he had no duties to perform at that time on the main line track (Rec., 188); that the rattle and roar of the approaching train were plainly audible (Rec., 188); that the evening (Sunday) was quiet (Rec., 185); that the track was straight (Rec., 184) (this straight track extending over a mile (Rec., 79, 91, 129, 131); that the en-

gine's headlight cast a bright light 700 or 800 feet ahead (Rec., 190); that these facts gave decedent ample opportunity to acquaint himself with the peril incident to the situation which led to his being injured (Rec., 190); that decedent was 62 years old, with 12 years' experience in this yard (Rec., 181); that "there is really nothing to explain such conduct or excuse the failure to use due care to leave the position of peril incident to the situation near the main line. He could not have been in a better position to hear the approaching train" or see the approaching light (Rec., 184, 190). The court therefore held that as decedent was guilty of contributory negligence, the jury, in accordance with the provisions of the Federal Employers' Liability Act, should have taken this fact into consideration in fixing the amount of damages, and as it had found decedent was not negligent and therefore had not taken such negligence into consideration, the case must be reversed and remanded. The essential facts upon which the court of appeals made its finding that decedent was guilty of negligence proximately contributing to his death are not in dispute. It also appears that under the statutes of Texas, "the judgments of the courts of appeal shall be conclusive on the law and the fact" (Complete Texas Statutes, 1920, Article 1591).

As we have already shown, the Supreme Court of Texas reversed the judgment of the court of appeals, and affirmed the judgment of the district court, erroneously failing to apply, on the facts thus found by the court of appeals, in a case arising under a Federal

statute, the rule established by the Federal courts, that decedent, on such facts, was negligent as a matter of law, and erroneously applying the rule established by the Texas courts, that on the facts as stated by the court of appeals the question of whether or not decedent was negligent was a question of fact for the jury. This ruling of the Supreme Court of Texas presents the principal question involved in this case.

After the original decision of said court of appeals, reversing said judgment of said District Court of Bowie County, a motion for a rehearing was filed (Rec., 193). On the rehearing the court of appeals reversed its original decision, on to wit: March 18, 1926 (Rec., 237), and held that the question of decedent's contributory negligence was one for the jury (Rec., 239-240), although, it is said, "in view of the rattling noise of the train and the glare of the headlight on the engine, in connection with the fact that deceased knew that the train was about due, it is difficult to impute to him utter ignorance of the approaching train." The court failed to rule that the finding of the jury that the glare of the headlight had "blinded decedent" was a finding that he actually knew of the approach of the train.

Thereafter defendant filed another motion for a rehearing (Rec., 241), and on that rehearing the court, in a majority opinion, on to wit: June 24, 1926, held (Rec., 244 *et seq.*) that "after an extended consideration of the record, it is believed by a majority of this Court that the original disposition of this case should

be adhered to" (Kansas City Southern Railway Co. *v.* Jones, 287 S. W., 304).

Thereafter plaintiff filed another motion for a rehearing (Rec., 249), and on to wit: October 7, 1926 (Rec., 275), the court overruled said motion (Kansas City Southern Railway Co. *v.* Jones, Administrator, 287 S. W., 304).

Thereafter said cause was taken by plaintiff on writ of error (Rec., 275 *et seq.*), to the Supreme Court of Texas, which court then had jurisdiction of said cause (Article 1521, Compiled Texas Statutes, 1920). Said Supreme Court, on, to wit: February 23, 1927 (Rec., 325 *et seq*), as above indicated, reversed the judgment of the court of appeals, on the ground (Rec., 326) that the trial court had found that the conduct of the decedent was not negligent, and that the court of appeals, through its majority, therefore erred in holding that it was. The supreme court thereupon affirmed the judgment of the district court (Jones *v.* Kansas City Southern Railway Co., 291 S. W., 528).

In due time defendant, your petitioner, filed in said Supreme Court its motion for a rehearing (Rec., 329), which motion was by said court denied on to wit: April 20, 1927 (Rec., 352); and your petitioner now makes application to this Court for a writ of certiorari to the Supreme Court of Texas. Your petitioner further says that by consent of counsel for said respondent the mandate in said cause is to be stayed until your petitioner can make application for this writ of certiorari.

Your petitioner respectfully says that the Supreme Court of Texas was in error in reversing the holding

of the court of appeals that the negligence of D. R. Ferguson was a proximate cause of his own death, and in affirming the judgment of the district court, and in not reversing the same.

Errors of the Supreme Court of Texas.

Your petitioner respectfully states that in the judgment and decision of the Supreme Court of Texas, upon the questions involved and hereinbefore referred to, petitioner was denied rights and immunities claimed by it under the Federal Employers' Liability Act, through certain rulings which are erroneous and in conflict with the decisions of this Court, and with the decisions of other courts of the United States, in the following particulars, to wit:

1. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that D. R. Ferguson was guilty of negligence directly contributing to his death. (Frese *v.* Chicago, etc. Co., 263 U. S. 1; Chesapeake, etc. Co. *v.* Nixon, 271 U. S. 218; Blunt *v.* Pennsylvania, etc. Co., 9 Fed. (2d) 395; Aerkfetz *v.* Humphreys, 145 U. S. 418; Elliott *v.* Chicago, etc. Co., 150 U. S. 245; Erie, etc. Co. *v.* Kane, 55 C. C. A. 129, 118 Fed. 223, 234; Pheasant *v.* Director General, 285 Fed. 342; Frazier *v.* Interstate, etc. Co., 273 Fed. 181 (certiorari denied, 256 U. S. 703); Miller *v.* Canadian, etc. Co., 281 Fed., 664; Chicago, etc. Co. *v.* Houston, 95 U. S., 697; Northern, etc Co. *v.* Freeman, 174 U. S., 379; Dernberger *v.* Baltimore, etc. Co., 155 C. C. A., 551, 243 Fed., 21; Payne *v.* Blevins,

280 Fed., 310; Atchison, etc. Co. *v.* McNulty, 285 Fed., 97 (certiorari denied, 262 U. S., 746); Bradley *v.* Missouri, etc. Co., 288 Fed., 484; Bush *v.* Baltimore, etc. Co., 288 Fed., 845; Parramore *v.* Denver, etc. Co., 5 Fed. (2d), 912, 913; Atlantic, etc. Co. *v.* McLeod, 11 Fed. (2d), 22; Allen *v.* New York, etc. Co., 98 C. C. A., 253, 174 Fed., 774; Louisville, etc. Co. *v.* Woodward, 99 C. C. A., 479, 176 Fed., 5; Garlich *v.* Northern Pac. Ry. Co., 67 C. C. A., 237, 137 Fed., 837, 841; Chicago, etc. Co. *v.* Andrews, 64 C. C. A., 399, 130 Fed., 65; Tomlinson *v.* Chicago, etc. Co., 67 C. C. A., 217, 134 Fed., 233, and Rollins *v.* Chicago, etc. Co., 71 C. C. A., 615, 139 Fed., 639.)

2. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that D. R. Ferguson was guilty of negligence which was the sole proximate cause of his death. (District of Columbia *v.* Moulton, 182 U. S., 576, 581; Craine *v.* Metropolitan, etc. Co., 246 Mo., 393; Goldberg *v.* Chesapeake, etc. Co., 211 Ky., 115.)

3. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that the death of D. R. Ferguson was the result of risks assumed by him. (Chesapeake, etc. Co. *v.* Nixon, 271 U. S., 218; Southern, etc Co. *v.* Berkshire, 254 U. S., 413; Atchison, etc. Co., *v.* Weyer, 8 Fed. (2d), 30; New York, etc. Co. *v.* McDougall, 15 Fed. (2d), 283.)

4. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in fail-

ing to reverse outright the judgment of the District Court of Bowie County, Texas. (See the authorities hereinbefore cited.)

5. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in reversing the judgment of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas. (See the authorities hereinbefore cited.)

6. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to follow the rules of law established by the Federal courts in construing the Federal Employers' Liability Act. (Chicago, etc., Ry. Co. *v.* Coogan, 271 U. S., 472; Pryor *v.* Williams, 254 U. S., 43.)

Your petitioner respectfully shows that the question of liability in this cause is governed by the statutes of the United States, and the decisions of this Court and other United States courts construing the same, and that the decision of the Supreme Court of Texas is in conflict with the decisions of this Honorable Court and with the decisions of other Federal courts, and that said decision of said Supreme Court of Texas should be corrected by this Honorable Court, in order that the same may conform with settled jurisprudence as fixed and established from time to time by this Honorable Court and other United States courts, all of which is fully set forth in the brief and argument in support hereof, which is attached hereto and filed herewith.

WHEREFORE your petitioner prays that a writ of certiorari be issued under the seal of this Honorable Court, directed to the said Supreme Court of the State of Texas, sitting at Austin, Texas, commanding the said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record of the proceedings of said Supreme Court had in this cause, to the end that the said cause may be reviewed and determined by this Honorable Court, as provided by law, and that said judgment of the said Supreme Court of the State of Texas be reviewed by this Honorable Court, and for such other relief as may seem proper, and for all of which your petitioner will ever pray.

FRANK H. MOORE,
J. J. KING,
J. Q. MEHAFFEY,
A. F. SMITH,
Attorneys for Petitioner.

STATE OF TEXAS,
County of Bowie, ss:

Frank H. Moore, being duly sworn, on his oath deposes and says that he is general solicitor for the Kansas City Southern Railway Company, the petitioner; that he assisted in preparing the foregoing petition, and that the allegations thereof are true, as he verily believes.

FRANK H. MOORE.

Subscribed and sworn before me this 18th day of June, 1927.

My commission expires October 21, 1928.

[SEAL.] CLARENCE R. HALL,
Notary Public in and for said County and State.

BRIEF OF PETITIONER IN SUPPORT OF ITS APPLICATION FOR WRIT OF CERTIORARI.

Petitioner (herein called the defendant) is praying for a writ of certiorari of the decision and judgment of the Supreme Court of Texas, made and rendered on, to wit, February 23, 1927 (Rec., 326, 328), and made final on its overruling defendant's motion for a rehearing on to wit, April 20, 1927 (Rec., 352). Said decision is not officially reported, but is unofficially reported (Franklin Jones, Admr., *v.* Kansas City Southern Railway Company, 291 S. W., 528).

The case is governed by the Federal Employers' Liability Act, and the Supreme Court of Texas, in passing on the questions of whether or not the death of D. R. Ferguson, for whose death this action was instituted, was caused or contributed to by his own negligence, or was the result of a risk assumed by him, erroneously refused to apply the interpretations of the law governing said questions as established by the Federal courts, but applied interpretations that were in conflict with the decisions of the Federal courts. Said questions were raised by pleadings (Rec., 8 *et seq.*), demurrers to the evidence (Rec., 23), by issues submitted to the jury (Rec., 39 *et seq.*), and on appeal (Rec., 188).

The Supreme Court of Texas, in its rulings, erred in the following particulars:

I.

The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that D. R. Ferguson was guilty of negligence directly contributing to his death.

The facts in this case are not at all complicated. The decedent was presumably struck by a passenger train running on a track upon which his duties did not call him. This track was straight for over a mile south of the place where he was struck; the engine pulling the passenger train was equipped with a strong headlight, making it plainly visible during all of the mile or more that it traveled before it reached decedent, and it was making noise enough to be plainly audible to him, whether or not its bell was rung or its whistle sounded. Decedent knew the time when this train was due, and it was coming in on time. His daughter testified that, though no whistle was sounded nor bell rung, she heard the train coming out of Staples and all the way into Leesville, Staples being over a mile away (Rec., 78). There was no evidence that decedent was engrossed in any work at the time he was struck. When last seen alive he was apparently waiting for further work to be brought to him. There was no evidence that there was anything to distract his attention, or that there was anything to prevent his hearing the

train or seeing it. The only explanation of decedent's permitting himself to be struck by the passenger train is that he put himself in a place of danger without giving any heed or thought to the approach of the train, which was plainly audible, visible, and to be expected at that time. Indeed, the jury found that the train's headlight "blinded" decedent, and therefore the presence of the train must have been actually known to him.

Men working in railroad yards must be vigilant for their own protection and are responsible for the consequences of their own neglect.

In Aerkfetz *v.* Humphreys, 145 U. S., 418; 36 L. Ed., 758, it was held that a repairer of tracks, employed in a railroad yard which was used for the making up of trains, and who was familiar with the manner in which the work was done, and who, knowing that the switch engine was busy moving cars and making up trains, placed himself with his face away from the direction from which cars were to be expected, and continued his work without ever looking back, although there was no obstruction to his vision, and by ordinary attention he could have observed the approaching cars, and while so employed was struck and injured by the switch engine moving slowly, was guilty of contributory negligence, which prevented his recovery from the railroad company (for his injury). The Court said: "The plaintiff, by this negligent inattention, contributed directly to the injury."

In Frese *v.* Chicago, etc., Co., 290 Mo., 501; 235 S. W., 97, an engineer of a Burlington train was killed as the result of a collision with a Wabash train at a railroad crossing in Illinois. An Illinois statute required all trains to stop at such crossings, and that "the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear, and that the train can safely resume its course before proceeding to pass the * * * crossing." The Supreme Court of Missouri held that the engineer was responsible for his own death, even though there may have been a custom or usage in force upon the engine in question whereby it became the duty of the fireman to look out for approaching trains on his side of the train, and to notify the engineer in case he saw an engine approaching the crossing over which they were to cross. This judgment was affirmed on writ of certiorari to the Federal Supreme Court (263 U. S., 1; 44 S. C. R., 1), the Court saying:

> "The statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

In Chesapeake, etc., Ry. Co. *v.* Nixon, 271 U. S., 218, 219, 220; 46 S. C. R., 495, 496, this Court said:

> "If the accident had happened an hour later, when the deceased was inspecting the track, we think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees. Aerkfetz *v.* Humphreys, 145 U. S., 418; 12 S. Ct., 835; 36 L. Ed., 758; Boldt *v.* Pennsylvania R. R. Co., 245 U. S., 441, 445, 446; 38 S. Ct., 139; 62 L. Ed., 385; Connelley *v.* Pennsylvania R. Co., 201 F., 54; 119 C. C. A., 392; 47 L. R. A. (N. S.), 867; Davis *v.* Philadelphia & R. Ry. Co. (D. C.), 276 F., 187; Pennsylvania R. R. Co. *v.* Wachter, 60 Md., 395; 4 Elliott on Railroads (3d Ed.), Sec. 1862. The duty of the railroad company toward this class of employees was not affected by that which it might owe to others."

The same rule was applied by Federal courts of appeals in the following cases:

Pheasant *v.* Director General, 285 Fed., 342.

Frazier *v.* Interstate R. Co., 273 Fed., 181 (certiorari denied, 256 U. S., 703).

Dishon *v.* Cincinnati, etc., Co., 66 C. C. A., 345; 133 Fed., 471.

Allen *v.* New York, etc., Co., 98 C. C. A., 253; 174 Fed., 779.

Louisville, etc., Co. *v.* Woodward, 99 C. C. A., 479; 176 Fed., 5.

Miller *v.* Canadian, etc., Co., 281 Fed., 664.

See also, Soccorso *v.* Philadelphia, etc., Co., 166 Fed., 378; S. C., 170 Fed., 722 (D. C.).

The failure (if any) of the defendant to follow its custom (if any) to have the engine bell ringing on the train by which the decedent was struck did not excuse decedent's failure to observe the approach of defendant's passenger train.

Even if defendant's trains customarily rang their engine bells in coming into Leesville, and it failed to ring the bell on this train, and this failure was a breach of a duty it owed decedent, that did not excuse decedent's failure to discover the approaching train. The giving of warning signals is merely an additional precaution to warn parties of the approach of trains lest they fail in their duty to use proper diligence. In other words, it is a double precaution to assist the non-vigilant in case they are lax in their duty to protect themselves. The enginemen's duty to warn the plaintiff is no greater than is the plaintiff's duty to look out for himself. In each case the duty is to be performed by a human being, and it would be an anomalous situation to say that where a railroad company calls upon one employee to assist another in protecting himself, it thereby takes from the employee to be protected all responsibility for his own protection.

In Jacobs *v.* Atchison, etc., Co., 97 Kan., 247; 154 Pac., 1023, plaintiff sued for the death of her husband, killed by a railroad train at a grade crossing. She contended that an electrical warning bell failed to operate and that her husband had a right to rely on this bell and was excused from looking or listening for the train. The court, in that case, used language aptly fitting this case:

> "If the plaintiff's contention in this respect is correct, a railroad increases its responsibility and liability by putting in electric bells at highway and street crossings. The object in putting in electric bells is to promote public safety, not to increase railroad liability."

In a general way, the duty of a man working in a railroad yard is governed by the principle which is applicable to a highway traveler at a railway crossing. Even where railway companies are required by statute to give certain warning signals in approaching highway crossings, the courts hold that a highway traveler may not rely entirely on the compliance with these statutes, but that he must use due vigilance to look out for trains, and if he fails to use such vigilance the railway company is not liable even though it fails to give the signals required by law. There is this difference between the highway traveler and the railroad workman: The railroad workman's experience teaches constant vigilance. He is required to be keenly observant, to look out for himself, and he is trained in the exercise of that vigilance. This Court and other Fed-

eral courts have applied to railroad workmen the rule applicable to highway travelers at railroad crossings.

In Elliott *v.* Chicago, etc., Co., 150 U. S., 245; 37 L. Ed., 1068, the foreman of a section gang was struck by some cars moving in a "flying switch." A verdict was directed for the defendant, which was affirmed by the Supreme Court. "It thus appears that the deceased, an experienced railroad man, on a bright morning and with nothing to obstruct his vision, starts along and across a railroad track with which he was entirely familiar, with cars approaching and only 25 or 30 feet away, and before he gets across the track is overtaken by those cars and killed. But one explanation of his conduct is possible, and that is he went upon the track without looking to see that any train was coming. Such omission has been again and again, *both as to travelers on the highway and employees on the road*, affirmed to be negligent. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on the track, or that there is no danger therefrom." (All italics in this brief, unless otherwise indicated, are ours.)

In Erie R. Co. *v.* Kane, 55 C. C. A., 129; 118 Fed. 223, 234, a fireman on a switch engine was killed as the result of a collision between his engine and another switch engine. At the time of the collision he was standing on the front of the engine engaged in cleaning the number on the engine. It was a part of his duties to do this work, but not while the engine was moving.

"Counsel for defendant in error urged that it was not negligence for decedent to be there because he was not bound to anticipate Bowker's negligence, through which the collision came about. It is never negligence, they say, for one not to anticipate negligence in anybody else. There is, however, no such general rule of law or prudent conduct. There are instances where, as a matter of law, it is negligence not to anticipate negligence in others. As, for instance, it is well settled in the Federal Courts that *it is negligence for a highway traveler not to anticipate failure on part of an engineer to give appropriate signals of approach of his train to a highway crossing.* He has no right not to look or listen because he has heard no such signals. Mr. Justice Field, in the case of Railroad Co. *v.* Houston, 95 U. S., 697; 24 L. Ed., 542, said:

"'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precaution for her safety. Negligence in the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen or look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of danger.'"

The rule established in the Houston case was thus stated in a head note written by Mr. Justice Field for this Court:

"The neglect of the engineer of a locomotive of a railroad train, to sound its whistle or ring

> its bell on approaching a street-crossing does not relieve a party from the necessity of taking ordinary precautions for his safety. He is bound to use his senses—to listen and to look—before attempting to cross the railroad track, in order to avoid any possible accident from an approaching train. If he omit to use them, and walk thoughtlessly upon the track, he is guilty of culpable negligence; and if he receive any injury, he so far contributes to it as to deprive him of any right to complain. If, using them, he sees the train coming and undertakes to cross the track instead of waiting for the train to pass, and is injured, the consequences of his mistake and temerity cannot be cast upon the railroad company. If one chooses in such a position to take risks, he must bear the possible consequences of failure." (Chicago, etc., Co. *v.* Houston, 95 U. S., 697; 24 L. Ed., 542, 543.)

In Northern Pacific R. Co. *v.* Freeman, 174 U. S., 379; 43 L. Ed., 1014 (a crossing case), it was held that where a person approaching a railroad crossing well known to him, when a coming train was in full view and he could have seen it while 40 feet distant from the track if he had used his senses, but did not look, or took the chance of crossing the track before the train reached him, and was killed, he was guilty of contributory negligence, and could not recover, even if the railroad company failed to give proper warning. In its opinion the court said:

> "The duty of a person approaching a railroad crossing, whether driving or on foot, to look and listen before crossing the track is so

> elementary, and has been affirmed so many times by this Court that a mere reference to the cases * * * is a sufficient illustration of the general rule."

In Garlich *v.* Northern Pac. Ry. Co., 67 C. C. A., 237; 131 Fed., 837, 841, the court said:

> "The well-settled rule of law is that no reliance upon the exercise of care by a railroad company will excuse a lack of the exercise of proper care by a person going upon a railroad track, or so near as to be in danger from passing trains."

See, also, Chicago, etc., Co. *v.* Andrews, 64 C. C. A. 399, 130 Fed. 65; Tomlinson *v.* Chicago, etc., Ry. Co., 67 C. C. A. 217, 134 Fed. 233; and Rollins *v.* Chicago, etc., Co., 71 C. C. A. 615, 139 Fed. 639, the opinion in all of these four cases having been written or concurred in by Mr. Justice Van Devanter, then Circuit Judge.

In Bradley *v.* Missouri Pacific R. Co., 288 Fed. 484, it was held that a guest in an automobile was guilty of negligence as a matter of law in failing to look out for an approaching train which could have been seen and heard if reasonable care had been used to discover said train. There was testimony of witnesses that they did not hear any bell rung or whistle blown. The court said:

> "It is noteworthy in the evidence of plaintiff's witnesses that a number of them, who did not hear the bell ring nor the whistle blow,

> heard the rumbling and noise of the train before they saw it. * * * Why Brown and Bradley, under these circumstances, did not hear it, when nearly everyone else in the vicinity seems to have heard it, can only be conjectured. If they could not see the train, it was their duty to listen. If they could not hear because of the noise of the automobile, it was their duty to stop." (The verdict in this case was for the defendant in the District Court, and the judgment was affirmed on appeal although, under the statutes of Arkansas, the question of contributory negligence was for the jury, and contributory negligence could diminish, but not bar, a finding for the plaintiff.)

The same rule was applied by Federal courts of appeals in the following cases:

> Dernberger *v.* Baltimore, etc., Ry. Co., 155 C. C. A., 51; 243 Fed., 21.
>
> Payne *v.* Blevens, 280 Fed., 310.
>
> Atchison, etc., Co. *v.* McNulty, 285 Fed., 97 (certiorari denied, 262 U. S., 746).
>
> Bush v. Baltimore, etc., Co., 288 Fed., 845.
>
> Parramore *v.* Denver, etc., Co., 5 Fed. (2d), 912, 913.
>
> Atlantic, etc., R. Co. *v.* McLeod, 11 Fed. (2d), 22

II.

The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that D. R. Ferguson was guilty of negligence which was the sole proximate cause of his death.

The jury found on special issues, 6, 7, and 8, that defendant's servants in charge of its passenger train failed to ring the bell on the engine of that train as it approached the place where said D. R. Ferguson was struck; that such failure was negligence, and that it was a proximate cause of his death (Rec., 37-38). The jury, however, also found on special issues 1 and 2 (Rec., 37-38), that the failure of defendant's servants in charge of its passenger train to dim the headlight of the engine of said train as it approached the place where D. R. Ferguson was struck was negligence, and that such failure "caused the said D. R. Ferguson to be blinded and thereby was a proximate cause of the death of said D. R. Ferguson."

It also appeared in evidence both on the part of the plaintiff and of the defendant that the noise and roar of defendant's passenger train was plainly audible long before it reached the place of the accident.

We earnestly insist that even if the engine bell had been silent, its silence was not a proximate cause of the death of decedent. It cannot be seriously contended that he was entitled to a particular kind of warning of the approach of the train, or to a particu-

lar kind of sound announcing such approach. There is no reason why the decedent, if he had been in the exercise of due care, could not have heard the noise and roar of the train just as the other witnesses did, and a finding that the ringing of the bell would have given notice of the approach of the train to one who failed to hear its rattle and roar is based on conjecture and speculation, and such a finding is not sufficient to support a judgment. (Chicago, etc., Co. *v.* Coogan, 271 U. S., 472.)

In St. Louis, etc., Co. *v.* Mills, 271 U. S., 344, 347, 348; 46 S. C. R., 520, a railroad inspector was shot to death by strikers on the back platform of a street-car on which he was riding home from work accompanied by a guard provided by the railroad company. It was contended that a railroad company was liable for failing to furnish more than one guard. This Court said that there was no "evidence from which the jury might infer that defendant's failure to provide an additional guard or guards was a proximate cause of decedent's death. Whether one or more additional guards would have prevented the killing is in the highest degree speculative. * * * On such a state of facts the jury should not have been permitted to conjecture what might have happened if an additional guard had been present." So, in this case, a finding that if the bell on defendant's engine had been rung it would have warned decedent in time for him to have gotten out of the way of the approaching train is purely speculative in view of the fact that the noise of the train loud enough for his daughter to hear it

a mile away, and the glare of the headlight which the jury found that he saw, were not sufficient for that purpose.

> "Conjecture is an unsound and unjust foundation for a verdict. Juries may not lawfully guess the money or property of one litigant to another." (Midland Valley R. Co. *v.* Fulgham, 104 C. C. A. 151, 181 Fed. 91, 95.)

When the jury found that the headlight on the passenger train was not dimmed and that it blinded decedent, it necessarily followed that he knew that a train was approaching. That fact would be self-evident to the most inexperienced person, and certainly must have been known to a railroad man familiar with electric railroad headlights. The jury, having found that decedent knew of the approach of the train because of the radiance of the headlight, a finding that the failure to ring the bell was necessary to warn him of the approach of that train was an inconsistent finding.

It goes without saying that one who has knowledge of an approaching train cannot complain of the failure of the operators of that train to give him notice of its approach.

> "We agree with the opinion of the supreme judicial court of Maine in Lane *v.* Lewiston, 91 Me. 292, 39 Atl. 999, that where a steam roller is allowed to remain upon a municipal highway it is requisite that the municipality causing the obstruction should give reasonable notice to the traveling public of its presence, but that a view

> of the obstruction itself in time to avoid it without injury amounts to notice. In other words, as stated by the Maine court, 'no one needs notice of what he already knows,' and 'knowledge of the danger is equivalent to prior notice.'" (District of Columbia *v.* Moulton, 182 U. S. 576, 581; 21 S. C. R. 840, 842.)

The sole purpose of warnings "is to acquaint the traveler with the danger, and, if he is possessed of knowledge of the danger independently of such notice, then the absence of notice, or his failure to see it if given, would not affect his rights" (Craine *v.* Metropolitan, etc., Street Ry. Co., 146 Mo., 393; 152 S. W., 24).

> "The evidence clearly showed that those in charge of the car saw the light from the train in advance of its approach long before it struck the car. They therefore did not need signals to advise them of its approach." (Goldberg *v.* Chesapeake, etc., Ry. Co., 211 Ky. 115, 276 S. W. 1086.)

In Blunt *v.* Pennsylvania, etc., Co., 9 Fed. (2d), 395, it was held that a crossing watchman who was struck by a truck which was thrown against him by a train, could not recover, as his business was to warn the driver of the truck of the approaching train, and his failure so to do was the proximate cause of the injury, even if the train was running too fast and failed to give warning signals.

See, also, Pheasant *v.* Director General, 285 Fed., 342.

III.

The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that the death of D. R. Ferguson was the result of risks assumed by him.

D. R. Ferguson was an experienced railroad man, having worked in the yards in which he was killed for ten years. The train by which it is presumed he was killed was due at that point at that time, and he knew it. While there was evidence of a breach of custom that engine bells would ring in going into Leesville, yet the noise of the train and its headlight furnished just as effective warning of its approach as could the bell, and especially to one who is trained to be on the look-out for train and car movements, and who is aware that the train is due at that particular time. The jury found that he was blinded by the train's headlight, and therefore he must have seen it. In such circumstances the Supreme Court of Texas should have ruled that the death of D. R. Ferguson was the result of risks assumed by him even if it were true that the bell on this train was not ringing and that the defendant owed Ferguson a duty to see that it did ring.

In Southern Pacific R. Co. *v.* Berkshire, 254 U. S., 413; 41 S. C. R., 162, it was held that an engineer must have known of the presence of a mail crane near the track, and that his death from contact therewith was a risk assumed by him.

> "Linder had been upon this route for some years, had passed over it many times and must

> be presumed to have known of the crane * * *. An experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger, and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train."

See, also, Chesapeake, etc., Ry. Co. *v.* Nixon, 271 U. S., 218, hereinbefore quoted.

An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know about them and to appreciate the danger. Atchison, etc., Co. *v.* Wyer, 8 Fed. (2d), 30.

In New York, etc., Co. *v.* McDougall, 15 Fed. (2d), 283, McDougall, a brakeman, was injured by coming in contact with a low bridge. It was held that his injuries were the result of a risk assumed by him.

> "The case affords an illustration of what may be assumption of risk without any contributory negligence, or in addition to it."

So far as concerns the failure to dim the headlight on the passenger train, it was shown that it was the universal practice for defendant's passenger trains going through the Leesville yards in the night-time to keep the headlights on such trains undimmed. There was evidence that this was the proper way to operate such trains (Rec., 166, 169, 171, 172, 173). Whether or not it was the proper way, it being defendant's prac-

tice and decedent necessarily being familiar with that practice, he assumed the risk of injury or death by reason of such practice.

IV AND V.

The Supreme Court of Texas, in a case arising under the Federal Employers' Liability Act, and on the facts in this case, erred in failing to reverse outright the judgment of the District Court, and in reversing the judgment of the Court of Appeals.

The judgment of the District Court in this case should have been disapproved for several reasons:

1. The Supreme Court of Texas should have found, on the facts, and under the authorities hereinbefore cited, that the Court of Appeals correctly decided that decedent's death was due in whole or in part to his own negligence.

2. The Supreme Court should have found that there had not been an acceptable adjudication that defendant was guilty of negligence. It was established by the great weight of the evidence that defendant's passenger train came into Leesville at its usual speed (Rec., 123, 133, 135); that proper whistle signals (Rec., 123, 129, 131, 132, 135, 159, 169) and bell signals (Rec., 123, 130, 132, 149, 152, 154) were sounded. See, also, opinion of the Court of Appeals, Rec. 184, 185). We appreciate that there is a general rule that appellate courts will not set aside verdicts merely because they are against the weight of the evidence. But that rule

ought not to apply when, as here, it is judicially found that the same jury has erred in its findings on other material issues.

3. The Supreme Court should have disapproved of the verdict of the jury because it contained self-contradictory findings. The jury found in this case, as we have heretofore shown, that proper signals of the approach of defendant's train were not given, and at the same time it found that the train's headlight "blinded" decedent. As the only purpose of the signals was to give notice of the train's approach, and decedent knew of that fact because its headlight "blinded" him, the alleged failure to give the signals or the alleged too rapid running of the train was not a proximate cause of the accident.

> "These findings of the jury being contradictory, it was the duty of the learned trial court to set aside the findings of the jury and grant a new trial, and the court's failure to so do, and his entry of judgment on such conflicting findings for defendant present error requiring a reversal of this case." (Stewart *v.* Schaff, Tex. Civ. App., 269 S. W., 135, 137. See, also, Kahn *v.* Cole, Tex. Civ. App., 227 S. W., 556; Wichita, etc., Co. *v.* Lechner, Com. of App. of Tex., 276 S. W., 216, 217.)

The finding by the jury that the headlight "blinded" decedent was a finding against the plaintiff, because it meant that decedent knew of the approach of the train, and as the headlight was customarily not dimmed on

defendant's passenger train, that "blinding" was a risk which decedent assumed.

VI.

The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to follow the rules of law established by the Federal courts in construing the Federal Employers' Liability Act.

The reason for the decision of the Texas Supreme Court in this case is that the rule of the Texas courts in cases of this kind is entirely different from that established by this Court and other Federal courts. In the Federal courts if a person crossing or working upon railroad tracks fails to look and listen for approaching trains, having a reasonable opportunity to see or hear them, the court, as a general rule, finds that his failure so to do is negligence. In the Texas courts if a person crossing or working upon railroad tracks fails to look or listen for approaching trains, having a reasonable opportunity to see or hear them, his failure so to do is, as a general rule, held to be negligence only if it is found to be so by the jury. We have hereinbefore cited a number of cases illustrating the rule of the Federal courts. The following cases illustrate the Texas rule:

In Trochta *v.* Missouri, etc., Co., 218 S. W., 1038, decedent was killed while driving a team and wagon

across a railway track. He was familiar with the crossing. The train made much noise, was visible for 194 yards when he was 50 feet from the track, and when 35 feet from the track he could see along the track half a mile. The Court of Appeals (Missouri, etc., Co. *v.* Trochta, 181 S. W., 761) held he was negligent as a matter of law, but it was reversed by the Supreme Court of Texas, which said that "the failure of one about to go over a public crossing to look and listen for an approaching train, does not, of itself, constitute negligence as a matter of law." (Trochta *v.* Missouri, etc., Co., 218 S. W., 1038, 1039, 1040.)

In Emberlin *v.* Wichita Falls, etc., Co., 267 S. W., 463, a pedestrian stepped from a walk paralleling a track at a station, in front of an approaching train, and was struck by it. He could have seen it at any point within 50 feet of the track. The Court of Appeals (Wichita Falls, etc., Co. *v.* Emberlin, 255 S. W., 796) reversed the judgment because of plaintiff's contributory negligence, and was itself reversed by the Supreme Court, although the jury had found that deceased had not looked to see whether a train was approaching before he attempted to step on the track, and that he did not listen for a train as he approached the track.

In Jones *v.* Louisiana, etc., Co., 243 S. W., 976, decedent was killed by a railroad train on a crossing which was in an open, level prairie. When he came within about 100 feet of the crossing there was nothing to obstruct his view down the track for miles, except the telegraph poles fifty feet away from and

parallel with the track, and the cattle guards near the crossing. The Court of Appeals (Louisiana, etc., Co. *v.* Jones, 233 S. W., 363) had reversed a judgment against the railway company, because "the undisputed fact that the deceased in broad daylight drove upon a railroad track in the open prairie in front of a train of seven cars with nothing to obstruct the view of the approaching train *prima facie* forbids the conclusion that in so doing he was using ordinary care." The judgment of the court of appeals was reversed by the Supreme Court on the ground that "it is the peculiar province of a jury, under our jurisprudence, to determine what constitutes ordinary care under a particular situation, or combination of circumstances."

In Freeman *v.* Galveston, etc., Co. 285 S. W., 607, plaintiff while driving an automobile was struck and injured by a train at a grade crossing. The highway ran north paralleling the track, and at a point 250 feet east of the track turned westward at almost right angles. The crossing was on a prairie. There were some obstructing bill boards close to and east of the right of way, but after passing them there was no obstruction for 50 feet before reaching the track. The jury found that plaintiff had not been guilty of negligence, and judgment was rendered for plaintiff. The Court of Appeals (Galveston, etc., Co. *v.* Freeman, 273 S. W., 979) first affirmed and then reversed the judgment. The Supreme Court reversed the judgment of the court of appeals and affirmed the judgment of the district court.

In Missouri, etc., Co. *v.* Riddle, 277 S. W., 167, 168, the court of appeals applied this same Texas rule to

a case arising under the Federal Employers' Liability Act. J. A. Riddle was working in a bridge gang repairing a bridge. The work not having been finished, his foreman sent him out along the track to flag incoming trains. He flagged an approaching train when it was 1,000 feet away from him, but while the engineer reduced the speed of the train it was not stopped before reaching Riddle, and he was struck and killed by it. The jury found the train was run at a negligent rate of speed, and that the engineer negligently failed to stop it before reaching Riddle. A verdict and judgment in favor of his widow was affirmed by the court of appeals, although, as stated by Judge Stanford in his dissenting opinion, there was nothing to prevent Riddle's stepping from the track in an instant. Certainly no Federal court would ever hold that under the facts in this Riddle case it was a question of fact for the jury whether or not Riddle was in the exercise of due care in permitting himself to be struck by a train which he saw coming toward him.

In the light of these decisions it is hardly an exaggeration to say that under the Texas rule practically all crossing cases, and all cases where a railway employee is struck by a train, present a question for the jury as to plaintiff's contributory negligence.

It is also clear from an examination of these decisions of the Supreme Court of Texas that the rule established by that court as to what facts constitute contributory negligence is entirely different from the rule established by this Court and other Federal courts on similar facts.

As this action was brought under the Federal Employers' Liability Act the rights and obligations of the plaintiff and the defendant are to be governed by that act, and by the rules established by this Court and other Federal courts in construing the act.

> "The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the Federal courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several States. This court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. St. L., Iron M. & S. Ry. *v.* McWhirter, 229 U. S. 265, 277, 33 S. Ct. 858, 57 L. Ed. 1179; New Orleans & N. E. R. R. Co. *v.* Harris, 247 U. S. 367, 371, 38 S. Ct. 535, 62 L. Ed. 1167; New Orleans & N. E. R. R. Co. *v.* Scarlet, 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752."
>
> Chicago, etc., Ry. Co. *v.* Coogan, 271 U. S. 472, 46 S. C. R. 564.

In Williams *v.* Pryor, 272 Mo., 613, a case arising under the Federal Employers' Liability Act, the defense was made that plaintiff's injuries were the result of risks assumed by him. The Supreme Court

of Missouri held that the defense of assumption of risk was a common law defense and that it was "the unbroken rule in Missouri that the servant never assumes the risk where such risk grows out of the negligence of the master" (621, 623). Accordingly, a judgment for the plaintiff was affirmed. The case came to this Court on writ of certiorari. This Court held that in its view of the Federal statute and the defense under it, "the Missouri court erred (citing authorities) and the requirement of the act prevails over any State law." (Pryor *v.* Williams, 254 U. S., 43, 41 S. C. R. 36.)

From the foregoing authorities it is submitted that the decision of the Supreme Court of Texas is in conflict with and contrary to numerous decisions of this Honorable Court, and in conflict with the decisions of other Federal courts, and for that reason the writ of certiorari should issue in order that the rulings on the question arising under the Federal Employers' Liability Act may be uniform. The very uncertainty of the appellate courts of Texas as to the law of this case is a cogent reason why it should be reviewed here by certiorari.

Inasmuch as the case is one of great importance, and inasmuch as the decision of the Supreme Court of Texas is in direct conflict with numerous decisions

of this Court, it is submitted that the writ of certiorari should be granted.

Respectfully submitted,

FRANK H. MOORE,
J. J. KING,
J. Q. MEHAFFEY,
A. F. SMITH,
Attorneys for Petitioner.

S. W. MOORE,
Of Counsel.

No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1927.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. E. FERGUSON, DECEASED, RESPONDENT.

ADDITIONAL BRIEF OF PETITIONER.

Frank H. Moore,
J. J. Link,
[illegible],
A. F. [illegible],
Attorneys for Petitioner.

S. W. Moore,
Of Counsel.

No. 349.

In the Supreme Court of the United States

OCTOBER TERM, 1927.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. R. FERGUSON, DECEASED, RESPONDENT.

ADDITIONAL BRIEF OF PETITIONER.

Respondent's Reply Brief to Petition for Certiorari contains a number of erroneous and misleading statements and assumptions; hence this additional brief. Petitioner will be called herein the "defendant," respondent the "plaintiff," and the deceased D. R. Ferguson the "decedent."

We have shown in our petition for writ of certiorari, and in our original brief herein, that decedent was a car inspector killed in defendant's yards at Leesville, Louisiana, probably by a passenger train of the defendant, which approached the place of the acci-

dent on a track which was straight for over a mile, and upon which the duties of decedent did not call him, the train coming in on time, its engine equipped with a bright headlight, which the jury found he saw, and the train making considerable noise, which others much further away plainly heard. We contend in our petition and in our original brief that the Texas Court of Appeals was correct in its holding that decedent was negligent in failing to observe and keep out of the way of said passenger train, and that the Texas Supreme Court erred in reversing the court of appeals. In his endeavor to answer this contention plaintiff makes a number of erroneous inferences and assumptions, of which the following are examples:

1. Plaintiff says in his brief (Brief, 3) that after the death of decedent it was found that the air had been coupled on the south 15 cars in the freight train which was being made up on the passing track, but the air had not been coupled on those north of these 15 cars, thus erroneously implying that there were then in the train cars which had not been inspected or coupled. Plaintiff also says that there was a free space of only 4 or 5 feet between a train on the passing track and a train on the main line, and that an inspector would "frequently, if not usually, get near enough to the main line to be struck by a passing train—a mere step, as there was barely room for one to stand in the clear" (Brief, 2). From these erroneous statements plaintiff makes the repeated and erroneous inference or presumption (for example pages 11, 16, 17 of his brief) that decedent's failure to see,

hear or heed the approaching passenger train was due to his being engaged in the coupling of the air hose and inspection of the cars north of the completed 15 cars, and to his being engrossed by such duties.

It appears from the testimony of R. T. Huson, a civil engineer of the defendant (Rec. 118, 119), and the finding of the Texas Court of Appeals (Rec. 182, 183), that the place of the accident was about 1200 feet south of the Leesville station. The defendant's railroad scales were about 500 feet south of the depot yard. The main line track between the Leesville depot and Staples, the next station south, was 7,804 feet, practically a mile and a half, the distance between the main line track and the passing track from center to center was 15 feet, from rail to rail 10 feet, and the space between cars on the main track and on the passing track approximately 6 feet. The witness who testified that the distance between cars was about 4 or 5 feet did not pretend to have made any measure of the distance but was merely making an estimate (Rec. 95).

Nick Franklin, a car inspector of the defendant called as a witness by the plaintiff, testified that the customary method in the inspection of a train that was being made up was for the inspector to begin with the cars next to the caboose and continue toward the head of the train, coupling the air and inspecting the cars one after another as he went along (Rec. 94, 95). He was called, upon the death of Mr. Ferguson, and it was his opinion that he arived at the freight train about 40 minutes or an hour after the accident (Rec. 96). He found the south 15 cars had the air coupled,

but those north of the south 15 had not had the air coupled (Rec. 94). L. E. Crawford, a witness for defendant, testified that about 12 or 15 cars had been thrown down to the caboose up to the time the passenger train came in (Rec. 145). At the time the passenger train came into Leesville the train crew and engine of the freight train were at the scale track (Rec. 149) some distance north of the place of the accident, where they were weighing cars, and shortly after the passenger train left, these cars were taken to the passing track and placed in the freight train (Rec. 176, 177; Burke, Rec. 136). A. H. Thorla, a witness for plaintiff, testified that he crossed the yards a short time before the passenger train came in. He saw some cars on the track next to the main line and passed about 30 or 40 feet north of the north car. When he passed the north car he saw Mr. Ferguson walking around there and carrying a lantern in his hand. Mr. Ferguson was then right about the end of the cars (Rec. 111, 112). Travis Barnhill, a witness for plaintiff, testified that he saw Mr. Ferguson before the train came in. His lantern was sitting on the ground and he was standing beside a car with his right hand on the side of the car, looking north, and he was at the north end of the car (Rec. 104). Reed Holton, a witness for the plaintiff, testified that he was with Travis Barnhill; that he saw Mr. Ferguson before the train came in, standing at the north end and on the west side of a car, with his hand on the car, his lantern sitting by him (Rec. 107). He was standing at the end of a string of cars (Rec. 109). See also the opinion of the court of appeals (Rec. 189).

No one saw the decedent at the time the passenger train passed, or for some time prior to its passing. No one testified that decedent was engaged in any work at the time the passenger train passed, or that he had just completed any work. So far as the evidence shows he had finished the coupling of the air and the inspection of the cars then on the passing track, and was waiting for the engine to bring additional cars to the track. Plaintiff's inference that decedent was engaged or engrossed in his work is not supported by any evidence in the record, nor is there any evidence tending to show why he should have stepped on or near the main line track without seeing the headlight of the coming train or hearing the roar and rattle of its approach. The court of appeals properly found that for twenty minutes before the passenger train arrived decedent "was not performing any duty there, although expecting more cars to be ultimately brought up to go in the train being made up. He was not engaged in inspecting the cars and in coupling them, as that work had been done as to the string of cars assembled. He was waiting for more cars to be brought there * * * The deceased failed to use any diligence to get away from the approaching train, having time to do so; and a judicial finding to the contrary is not warranted" (Rec. 189-190, 191).

2. Defendant says (Brief, 17) that it may be assumed that while decedent "was engrossed in his work, if he in fact heard the rumbling, the ordinary noises of the approaching train, he concluded that

the same came from the movement of the engine that was making up the freight train, and certainly that he may have concluded that there was no train in dangerous proximity to him."

It must be borne in mind that decedent was an experienced railroad man, with 10 or 12 years' service at Leesville as a car inspector. It must have been an eager jury indeed which could believe that decedent heard the rapid exhaust, and rattle and roar, of the passenger train coming from the south, and was justified in believing that it was a freight engine slowly shoving cars from the north, and that it was therefore safe for him to be on or near the main line track, without looking out for the passenger train which was due at that time and whose headlight, according to the finding of the jury, was visible to him.

3. Plaintiff makes the frequent inference in his brief (Brief, 5, 9, 16, 27) that decedent was confused by the blinding headlight on defendant's passenger train. The court of appeals held that "it is apparent from the evidence that an occasion of blame for the death cannot be predicated * * * in not diminishing the light of the headlight while going through the yard" (Rec. 187, 188, 189); and the finding of the court of appeals on that issue has never been modified or reversed, and is not subject to review here.

Furthermore, the ruling of the court of appeals was correct. Three witnesses testified that when one looks toward the headlight of a passenger engine within 200 or 250 feet of it the effect is blinding on the person so looking (Nelson, Rec. 85; Franklin, Rec. 116;

Anderson, Rec. 170). But there is no evidence in the record that the headlight is blinding if one does not look at it, and certainly a man of the experience of the decedent would not have been so confused by the headlight that he could not have stepped off of the main line track, either to the east or to the west, and have avoided being struck by the train.

There is no merit in plaintiff's contention that there was any negligence in failing to dim the headlight in going through the yard. The rules of the Interstate Commerce Commission require railroad companies to maintain dimmers on such headlights so that they may be dimmed, but the railway companies may use their own discretion as to when the dimmers should and should not be used. The practical purpose of them is to prevent the engineer of one train being blinded by the headlight of another when they are moving through railroad yards. There was no evidence of any order, rule or necessity that such headlight should be dimmed in going through a railroad yard on any other occasion, and, as shown by the testimony of executive officers of several railroads, the dimming of the headlight would tend to increase accidents rather than prevent them (Rec. 166, 169, 171, 173). See also, the opinion of the court of appeals (Rec. 189).

4. Plaintiff, having erroneously assumed that decedent was so engrossed in his work that he failed to heed the roar and rattle of the approaching passenger train, or its headlight, which the jury found he saw, further assumes (Brief, 13) that he might have been warned if the bell had made a "sharp sound" (Brief,

16). This is piling presumption on presumption, and purely speculative ones at that (*Cunard etc. Co.* v. *Kelley*, 126 Fed. 610; *Atchison etc. Co.* v. *DeSedille*, 219 Fed. 686). If the noise of the approaching train and the light of its headlight were not enough to warn decedent to step to a place of safety, how could it be fairly found that the ringing of a bell would have caused or enabled him to do so?

5. Appellant seems desirous of creating the inference (Brief, 1) that defendant "concedes" that the Supreme Court of Texas correctly held its alleged negligence in failing to ring the engine bell, proximately caused Ferguson's death, and thus eliminates the question of Ferguson's being guilty of negligence which was the sole cause of his death, and that we have "found no fault with the decision of the Texas Supreme Court in that regard." Our views on that question appear on pages 31 and 32 of our original brief herein, where we contend that the Texas Supreme Court should have found that there has not been an acceptable adjudication that defendant was guilty of any negligence.

The court of appeals reached the conclusion, from the character of the decedent's injuries (Rec. 190), and the blood-spots on the step of the pilot (Rec. 188), that the deceased must have been sitting or squatting near the outer ends of the ties under the east rail of the main line track when he was struck (Rec. 108). Plaintiff says that it is "conceded" that decedent was erect at the time he was struck (Brief, 5, 8, 9), and that the case was tried by both parties on that theory. No one saw decedent struck; no one

knows just what was his position; the question of whether he was standing or sitting is a matter of argument, and not of concession, and the court of appeals found he was sitting or squatting (Rec. 190).

6. In our original brief (p. 18) we contended that if it was the custom for defendant's trains to have their engine bells ringing in going through the Leesville or other yards, this practice was merely an additional precaution to warn of the approach of trains, employes or other persons who might be lax in their duty to be on the lookout for such trains. Plaintiff contends (Brief, 18) that the purpose of this practice was not to add an additional safeguard for the purpose of assisting employes in protecting themselves from death and injury, but was to take from them their instinct of self preservation, so as to increase efficiency and "output." There is no support in the evidence, record, fact, or conscience, for this reckless contention.

Respectfully submitted,

FRANK H. MOORE,
J. J. KING,
J. Q. MAHAFFEY,
A. F. SMITH,
Attorneys for Petitioner.

S. W. MOORE,
Of Counsel.